IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1945

No. 396

SALMON AND COWIN, INC., MINING ENGINEERS AND CONTRACTORS,

Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT AND BRIEF IN SUPPORT THEREOF.

HORACE C. WILKINSON,
BORDEN BURR,
Counsel for Petitioner.

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vs.

NATIONAL LABOR RELATIONS BOARD,

Respondent

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT.

Your petitioner, Salmon & Cowin, Inc. Mining Engineers and Contractors, a corporation, organized under the laws of the State of Alabama, respectfully prays that a Writ of Certiorari issue out of this Court to review the final

decree of the U. S. Circuit Court of Appeals for the Fifth Circuit rendered in the cause of Salmon & Cowin, Inc., Mining Engineers and Contractors, a corporation, Petitioner, vs. National Labor Relations Board, Respondent, and National Labor Relations Board, Cross-Petitioner, vs. Salmon & Cowin, Mining Engineers and Contractors Supply Co., a corporation, Cross-Respondents, No. 11138 in said court, on to-wit, the 1st day of June, 1945, whereby said Circuit Court of Appeals overruled petitioner's application for a rehearing of the order, judgment, or decree rendered by said court on the 30th day of April, 1945, wherein said Circuit Court of Appeals ordered, adjudged, and decreed that your petitioner cease and desist from discouraging membership in and interfering with their employees in relation to labor organizations and to reinstate and make whole one J. P. Milam found to have been discriminatorily discharged.

The opinion of the Circuit Court of Appeals is not officially reported but appears at page 80 of the Record. The decree sought to be reviewed appears at page 92 of the Record.

Summary Statement of the Matters Involved

The National Labor Relations Board issued its complaint against petitioner upon amended charges filed on November 12, 1943, by the International Union of Mine, Mill and Smelter Workers, affiliated with the Congress of Industrial Organizations. For convenience, we refer to the National Labor Relations Board as the "Board," the International as the "Union" and the petitioner as "Salmon."

Among other things, the complaint charged that Salmon discharged Milam and refused to reinstate him because of his membership and activities in the Union.

All charges in the complaint were denied by Salmon.

The Board ordered Salmon to cease and desist from discouraging membership in and interfering with their employees in regard to labor organizations and Salmon was

ordered to reinstate and make whole Milam who was found to have been discriminatorily discharged.

Salmon filed a petition in the U. S. Circuit Court of Appeals for the Fifth Circuit in which Salmon charged that the jurisdiction of the Board to pass on the question of whether or not Milam was discharged because of his membership and activity in the Union was fraudulently acquired by the fraudulent concocted claim set forth in the petition to the effect that Salmon discharged Milam and refused and failed to reinstate him because of his membership and activities in the Union.

Salmon claimed in the petition in the Court of Appeals that Milam caused said simulated claim and said statement to be included in the complaint in said cause knowing it was false and that he supported said fraudulent claim by wilfully and corruptly and falsely testifying to the effect that he was discharged by Salmon and had since been refused reinstatement because of his membership and activities in the Union and in that way, procured and obtained the rendition of the part of the decree sought to be reviewed.

Salmon averred in its petition in the Court of Appeals (R. p. 5) *that the only evidence tending to support the fraudulent claim Milam caused to be incorporated in the complaint before the Board was the testimony of Milam himself.* Salmon claims that testimony was perjured from start to finish.

The Board filed a petition for enforcement in full of its order against Salmon. Salmon's position was that it never discouraged membership in labor organizations and never interfered, restrained or coerced its members in any way and therefore it did not object to the cease and desist order and did not seek a review thereof.

Salmon's prime defense is that the jurisdiction of the Board to decide whether or not Milam was discharged for

Union activity was invoked by the fraudulent averment or fraudulent charge that Milam was discharged for unionism and that Milam perjured himself to support the fraudulent charge.

The primary issue before the Board was whether Milam was discharged for Union activity or on account of the fact that Milam, a white man, turned to a group of negro employees who were getting off a skip and said to them, "No checks, no work tomorrow." (Vol. 2 appendix to brief for petitioner, page 232, R. 595.)

Milam admitted telling the men that they should not work Saturday unless they were paid on Friday. Saturday was the regular pay day.

Milam claimed that the statement was made on the skip as the men were going down into the mine and not when they were leaving it.

The significance of a white man telling a group of negroes not to work on Saturday unless they were paid on Friday is that under the circumstances existing, the statement was equivalent to an order to the negroes to cease work and was well calculated to seriously interrupt the work that Salmon was doing in the mine.

The Circuit Court of Appeals agreed with us that if the jurisdiction of the Board to decide the issue was invoked by a fraudulent averment and Milam perjured himself to support the fraudulent charge, Salmon was entitled to relief. But the court said that the Board's finding crediting Milam was conclusive and binding and an insurmountable obstacle in the way of relief. Said the court:

> "Salmon's brief, with its 17 categorical charges of false swearing against Milam and its support of these charges by references to the controverting proof, and to the almost complete lack of corroboration of Milam's statements, does go far, in the light of the admitted

fact that Milam did advise the men that they should not work Saturday unless paid Friday, and that this brought on his discharge, to show that Milam's testimony that he was discharged for unionism was unworthy of belief, and the Board ought not to have credited his testimony. But having failed to convince the Board, with whom alone convincing counted, that Milam was a fraud doer and a perjurer, Salmon's efforts to convince have no office here. Under the statute, we must leave questions of credibility to the Board, just as we leave them in jury cases to the jury, we must take the facts as Board and jury have found them. Since this is so, Salmon's very argument that Milam's testimony has covered, though falsely, every material point, defeats its petition for relief, for it affirms that there is positive evidence accredited by the Board on each material point."

Our insistence is that the Board's finding does not prevent the court from considering any relevant evidence when petitioned to grant relief on the ground that the jurisdiction of the Board was fraudulently invoked and the fraudulent charge supported by perjured testimony.

II

Opinion Below

The opinion of the Court of Appeals for the Fifth Circuit is not officially reported but appears at page 80 of the Record. The decree of the Court appears at page 92 of the Record.

III

Jurisdiction

The jurisdiction of this Honorable Court is invoked under Title 28, Sec. 347 of the United States Code and Rule

38 of the Revised Rules of the Supreme Court of the United States adopted February 13, 1939, amended March 25, 1940, October 21, 1941, and May 26, 1941.

IV

Questions Presented

The questions presented are:

(1) Whether the U. S. Circuit Court of Appeals for the Fifth Circuit is prohibited from examining the record before the National Labor Relations Board in Case #10-C-1413 in the matter of Salmon & Cowin, Inc., Mining Engineers and Contractors, and International Union of Mine, Mill and Smelter Workers for the purpose of ascertaining and declaring whether or not Milam fraudulently invoked the jurisdiction of the Board and perjured himself to support the fraudulent charge that he was discharged for union activity.

(2) Is Salmon deprived of relief against an oppressive order rendered by the Board in a case in which its jurisdiction was fraudulently invoked and the fraudulent charge supported exclusively by perjured testimony.

(3) Does the provision in subparagraph (d) in Title 29, Sec. 160, U. S. C. A., to the effect that:

> "The findings of the Board as to the facts, if supported by evidence, shall be conclusive,"

bar the U. S. Circuit Court of Appeals for the Fifth Circuit from examining the record of Milam's testimony before the Board in connection with other testimony before the Board for the purpose of ascertaining and adjudicating whether or not Milam committed perjury when he testified before the Board.

V.

Reasons Relied On for Allowance of the Writ

(1) The Circuit Court of Appeals for the Fifth Circuit decided an important question of Federal law which has not been but should be settled by this Court.

(2) The Circuit Court of Appeals for the Fifth Circuit has decided a Federal question probably in conflict of applicable decisions of this Court.

(3) U. S. C. A. 29, Sec. 160(d) as construed by the Circuit Court of Appeals for the Fifth Circuit and applied to the facts in this case violates the "due process of law" clause of the Constitution of the United States.

(4) The Circuit Court of Appeals for the Fifth Circuit has so far departed from the accepted and usual course of judicial proceeding as to call for an exercise of this Court's supervision.

VI.

Specification of Errors to Be Urged

The Circuit Court of Appeals for the Fifth Circuit erred—

(1) In rendering the decree dated June 4, 1945,

(2) In denying Salmon's petition,

(3) In granting the Board's petition, to reinstate and make whole J. P. Milam.

(4) In holding in effect that it could not look to or examine the Board's record for the purpose of ascertaining and adjudicating that the jurisdiction of the Board to decide whether or not Milam was discharged for Union activity was invoked by a fraudulent

averment and that Milam perjured himself to support the fraudulent charge.

(5) In holding in effect, that the determination of the questions of fact which underlie the proposition that the jurisdiction of the Board was fraudulently invoked and that Milam perjured himself to support the fraudulent charge in invoking the Board's jurisdiction is confided exclusively to the Board.

SALMON AND COWIN, INC., MINING ENGINEERS AND CONTRACTORS, A CORPORATION,

By HORACE C. WILKINSON,
BORDEN BURR,
Both of Birmingham, Alabama,
Counsel for Petitioner.

IN THE

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OCTOBER TERM, 1945

No. 396

SALMON AND COWIN, INC., MINING ENGINEERS AND CONTRACTORS, A CORPORATION,

Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD,

Respondent.

MAY IT PLEASE THE COURT:

The question sought to be reviewed is a question of law, an error apparent on the face of the opinion of the Circuit Court of Appeals for the Fifth Circuit. As we understand this case, it is wholly unnecessary for the Court to even have recourse to the record of the National Labor Relations Board, filed in the United States Circuit Court of Appeals for the Fifth Circuit. We do not ask this court to undertake to decide whether or not Milam perjured himself when he testified before the Board.

U. S. C. A., Title 29, Section 160(d) declares that

> "The findings of the Board as to the facts, if supported by evidence, shall be conclusive."

The only testimony in the Board's record relating to the charge that Milam was discharged because of his union activity is the testimony of Milam himself. We do not understand that that proposition is controverted. We, therefore submit that if Milam's testimony before the Board was perjured, then the findings of the Board were arbitrary and not supported by the evidence.

I

We further submit that Congress has not foreclosed an investigation of fraud by the courts. The finding of the Board that it was not defrauded is not conclusive on the judiciary. We respectfully insist that when relief is asked on the ground that the only evidence before the Board tending to support the charge that Milam was discharged for union activity was perjured evidence, the court must examine any relevant evidence, including the Board's record, in reaching a decision.

It has been said that there is no wrong without a remedy. If Milam caused the jurisdiction of the Board to be fraudulently invoked and undertook to support the fraudulent charge with perjured testimony, Salmon is entitled to relief. The fact that the Board decided that Milam did not perjure himself is of no moment. Whether Milam fraudulently caused the Board's jurisdiction to be invoked and willfully and corruptly swore falsely about a material matter in an effort to support the fraudulent charge is essentially a judicial question which can only be authoritatively decided by a court. When a charge is made in good faith that the Board's jurisdiction was fraudulently invoked and that

Milam undertook to support the fraudulent charge with perjured evidence, we submit that due process requires the final decision of that question by the court.

We think the court will find an analogous proposition in *Chicago R. R. Co.* v. *Minnesota,* 134 U. S. 418. In that case a state statute made rates recommended and published by a railway commission final and conclusive as to what were equitable and reasonable charges. In striking down the statute the court said:

> "It deprives the company of its right to a judicial investigation, by due process of law, under the forms and with the machinery provided by the wisdom of successive ages for the investigation judicially of the truth of a matter in controversy, and substitutes therefor, as an absolute finality, the action of a railroad commission which, in view of the powers conceded to it by the state court, cannot be regarded as clothed with judicial functions or possessing the machinery of a court of justice."

II

If a finding of the Board on the question of perjury, vel non, is conclusive in this case, why isn't the petitioner deprived of its right to a judicial investigation by due process of law on the question of whether or not perjury was committed *as a basis for judicial relief.*

In *Labor Board* v. *Jones and Laughlin,* 301 U. S. 47, this court said:

> "The board must receive evidence and make findings. The findings as to the facts are to be conclusive, only if supported by evidence. The order of the Board is subject to review by the designated court, and only when sustained by the court may the order be enforced."

It is a vain and useless thing to make the order of the Board subject to review by the United States Circuit Court

of Appeals for the Fifth Circuit if that court is eviscerated of all authority and jurisdiction to determine whether or not Milam testified willfully and corruptly false. To say that a court may review but may not hear or consider evidence of perjury is a denial of due process.

In *Pyle* v. *Kansas,* 317 U. S. 213, this court ruled that imprisonment resulting from perjured testimony knowingly used by the State authorities to obtain a conviction was a deprivation of rights guaranteed by the Federal Constitution and if proven would entitle a prisoner to release from custody. It might well have been argued that the Kansas court that tried the prisoner in that case decided that perjured testimony was not knowingly used by the State when it overruled the prisoner's motion for a new trial and sentenced him to life imprisonment and that its decision was conclusive. This court apparently declined to accept a suggestion of that kind.

Mooney v. *Holohan,* 294 U. S. 103.

We submit that it does not matter how the Circuit Court of Appeals for the Fifth Circuit is convinced that Milam perjured himself; whether by his testimony, the testimony of others, a subsequent investigation or otherwise. The important thing is, does the showing made convince the court that he was a fraud doer and a perjurer?

The opinion written by the United States Circuit Court of Appeals for the Fifth Circuit clearly intimates that the court was of the opinion that Milam's testimony that he was discharged because of unionism was unworthy of belief. The court, however, took the position that having failed to convince the Board "with whom alone convincing counted, that Milam was a fraud doer and a perjurer, Salmon's efforts to convince have no office here."

We respectfully submit that was a complete abdication of the judicial function.

We do not believe that Congress intended to prevent the United States Circuit Court of Appeals ascertaining and declaring that Milam's testimony before the National Labor Relations Board in support of a charge that Milam was discharged for unionism, was perjured testimony. If it did, then Congress violated the due process of law clause of the Constitution of the United States.

If the courts of the country have jurisdiction and authority to grant a litigant relief on the ground that the decree against him was obtained by fraudulent invocation of jurisdiction and perjured testimony to support the charge, then the exercise of the judicial function to find out the truth cannot be prevented by a finding of an administrative body. An administrative finding is not a judicial decision. A court empowered to examine a record for the purpose of ascertaining whether or not a finding is supported by substantial evidence (*Labor Board* v. *Columbian Co.*, 306 U. S. 292) must have the authority to decide whether or not the testimony was perjured in order to decide whether the evidence is substantial. Perjured testimony is not substantial testimony.

Respectfully submitted,

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BORDEN BURR,
Attorneys for Petitioner.

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CITATIONS

668430—45

In the Supreme Court of the United States

OCTOBER TERM, 1945

No. 396

SALMON AND COWIN, INC., MINING ENGINEERS AND CONTRACTORS, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

OPINIONS BELOW

The opinion of the court below (R. 80–83) [1] is reported in 148 F. 2d 941. The findings of fact,

[1] The record before this Court is composed of four volumes, the "Appendix to Brief for the National Labor Relations Board" in the court below, herein referred to as "B. A. "; two volumes entitled "Appendix to Brief for Salmon & Cowin, Inc," herein referred to as "P. A. Vol I, " and "P. A. Vol. II, " respectively; and a volume entitled "Transcript of Record," which contains the Board's decision and order, herein referred to as "R. Dec. ," followed by the pleadings in this proceeding, herein referred to as "R. Pl. ," and the opinion, decree and other proceedings in the court below, herein referred to as "R. ."

conclusions of law, and order of the National Labor Relations Board (R. Dec. 9–45) are reported in 57 N. L. R. B. 845.

JURISDICTION

The decree of the court below (R. 92–95) was entered on June 4, 1945. A petition for rehearing, filed by petitioner on May 17, 1945 (R. 85–91), was denied on June 1, 1945 (R. 92). The petition for a writ of certiorari was filed on September 4, 1945. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925, and under Section 10 (e) and (f) of the National Labor Relations Act.

QUESTION PRESENTED

Whether there is substantial evidence supporting the findings of the Board, sustained by the court below, that petitioner discriminatorily discharged one Milam in violation of Section 8 (1) and (3) of the Act.

STATUTE INVOLVED

The pertinent provisions of the National Labor Relations Act are set forth in the Appendix, *infra*, pp. 12–14.

STATEMENT

Upon charges (R. Pl. 12–13) duly filed by the International Union of Mine, Mill and Smelter Workers, herein called the Union, the National Labor Relations Board issued a complaint against

petitioner which alleged in substance that petitioner had violated Section 8 (1) and (3) of the Act by discharging and refusing to reinstate one Milam because of his membership and activities on behalf of the Union, and had violated Section 8 (1) by threatening its employees that if they joined the Union they would lose their jobs or that petitioner would close its business, by questioning employees and applicants for employment as to their union membership, and by other anti-union activities (R. Pl. 14–19). After the usual proceedings, the Board issued its findings of fact, conclusions of law and order (R. Dec. 9–45). The facts, as found by the Board and shown by the evidence, may be summarized as follows:[2]

When Milam was employed by petitioner in February 1943 (R. Dec. 30; B. A. 31), petitioner's president inquired as to his union membership, and, upon finding that Milam belonged to a union, cautioned him not to "go out there and cause [a] disturbance amongst the men" (R. Dec. 30; B. A. 31–32). At this time there was no union activity among petitioner's employees.

Five months later, on July 8, 1943, Mooney, a representative of the Union, began to organize petitioner's employees and selected Milam as the chairman of a committee of three employees to serve as leaders of this movement among their

[2] In the following statement, the references preceding the semicolons are to the Board's findings and the succeeding references are to the supporting evidence.

co-workers (R. Dec. 21; B. A. 24–26). Of the three committee members, Milam was the most vigorous and active. He talked of the Union to the men as they rode to work in the company truck; he distributed union cards; and, on July 14 and 15, he distributed notices of a union mass meeting which was scheduled for Sunday, July 18 (R. Dec. 21–22; B. A. 26–27, 39–42). This activity was carried on openly and shortly came to the attention of petitioner's supervisors. A foreman, Chenowith, saw Milam distributing the notices for the meeting of July 18 in front of the company bath house and curtly ordered him off the sidewalk "with them damn things," saying ". . . the damn union ain't going to help you none" (R. Dec. 22; B. A. 42, 61). On or about Tuesday, July 20, Mooney, the union representative, requested a conference concerning the employees of petitioner who were members of the Union (R. Dec. 22–23; B. A. 11–13, 80). A conference was scheduled for Thursday, July 22, but was later postponed until July 29, (R. Dec. 23; B. A. 11–13). Immediately after this conversation, petitioner's president, Cowin, had prepared and, on July 22, distributed to his employees a letter stating that the Union had requested a conference with him, that no employee would gain benefits through union membership not obtainable otherwise and that he would curtail operations and work with a small group who could "go

along" with him if there were any "additional strain" placed upon him (R. Dec. 25–26; B. A. 77, 79). Twice thereafter, on July 30, while the Union was attempting to negotiate with him, and about the middle of September, Cowin polled his employees, requesting them to cooperate by signing statements concerning their union membership and desire for union representation (R. Dec. 26–29; B. A. 13–19, 59–61, 81–84).

For several weeks prior to July 19, Superintendent Blocker had been paying the day shift, of which Milam was a member, on Friday instead of on Saturday, the usual pay day, at the special request of the men, who said that they could not get their Saturday shopping done when paid on Saturday afternoon (R. Dec. 31; B. A. 44, 51, 62–63). On Wednesday, July 21, Blocker announced that he had discovered that "paying off" on Friday was resulting in Saturday layoffs and that he was going to discontinue the practice (R. Dec. 31; B. A. 44–45). Many of the men, including Milam, protested that if they were not paid on Friday, the twenty-third, they would not work on Saturday (R. Dec. 31; B. A. 44–45, 64). Blocker did pay the men that Friday (R. Dec. 35; B. A. 63, 66–67). In the evening, however, he telephoned Milam and instructed him to report to the office the following morning (R. Dec. 31; B. A. 46, 64). Milam reported as ordered, but when Blocker failed to arrive at the office, Milam, at the sug-

gestion of his foreman, boarded a truck with the working crew, rode to the mine, and commenced the day's work (R. Dec. 31; B. A. 52, 68). Later that morning, Blocker called Milam from his work; accused him of instigating the "no pay, no work" movement; observed that Milam was the "ringleader of this damned Union"; stated that Cowin had "lived always without a union" and was going to continue to do so; characterized Milam's union activities in obscene terms; and discharged him (R. Dec. 31; B. A. 45–49; 53–54). When Milam was paid off, Blocker handed him a copy of the letter of July 22, saying that it would explain why the petitioner was opposed to the unionization of its employees (R. Dec. 33; P. A. Vol. I, 73, P. A. Vol. II, 330–333, B. A. 74–76). Following Milam's discharge, Foreman Lowrey told employee Hall that "If this works," Blocker intended to terminate the employment of Price and Davis, the other two members of the Union's organizing committee (R. 33–34, 36; B. A. 26, 54–55, 60–61). In mid-September, while Milam was distributing union literature outside the petitioner's properties, Foreman Love, to whom he handed one of the leaflets, advised Milam that if he went to Cowin and said "to hell with the damn Union" and apologized, Cowin would immediately restore him to his former job (R. Dec. 34; B. A. 42–43).

The Board, after appraising the evidence respecting Milam's discharge against the background

of events immediately preceding and following it, concluded that petitioner terminated his employment because of his outstanding union activity and that this conduct constituted an unfair labor practice within the meaning of Section 8 (1) and (3) of the Act (R. Dec. 35–38).

Insofar as here material, the Board's order (R. Dec. 13) required petitioner to offer Milam immediate and full reinstatement to his former or substantially equivalent position and to make him whole for any loss of pay he may have suffered by reason of the discharge.

On April 30, 1945, the court below handed down its opinion enforcing the Board's order in full (R. 80–83). On May 17, 1945, petitioner requested a rehearing (R. 85–91) which the court denied on June 1, 1945 (R. 92) and on June 4, 1945, a decree was entered (R. 92–95).

ARGUMENT

While petitioner argues that the court below denied it judicial review by refusing to consider whether Milam was a credible witness (Pet. 9–13), it is apparent from the record that the only real question in this case is whether there was substantial evidence to support the Board's findings. That issue is not one of general importance and the supporting evidence summarized in the Statement, *supra*, pp. 3–7, is, in any event, more than ample.

In refusing to substitute its own judgment as to credibility for that of the Board, the court below has merely following the oft-repeated rulings of this Court. See, *e. g., National Labor Relations Board* v. *Link Belt Co.*, 311 U. S. 584, 597; *National Labor Relations Board* v. *Waterman Steamship Corp.*, 309 U. S. 206–226; *National Labor Relations Board* v. *Nevada Consolidated Copper Corp.*, 316 U. S. 105. Petitioner's characterization of Milam's testimony as "perjured" (Pet. 6, 10–13) does not change the nature of the issue when, as here, there is no foundation in the record for such a characterization. If it appeared that the Board was wholly arbitrary and capricious in giving credence to Milam's testimony, the decision of the court below might be rendered questionable. But the Board carefully weighed the issue of credibility and fully considered the question as to whether Milam's testimony was corroborated by other evidence and consistent with the undisputed facts.

The trial examiner who observed Milam and heard him testify made a careful and painstaking analysis of the witness and his testimony and concluded that any inconsistent statements he may have made did not mark him as an untruthful witness but were explained by the unusually long questioning to which he was subjected, by his virtual illiteracy and lack of education, and by

his general ineptitude as a narrator (R. Dec. 22, n. 12). (See *Valley Mould & Iron Corp. v. National Labor Relations Board,* 116 F. 2d 760, 763 (C. C. A. 7), certiorari denied, 313 U. S. 590; *National Labor Relations Board* v. *Superior Tanning Co.,* 117 F. 2d 881, 888 (C. C. A. 7), certiorari denied, 313 U. S. 559.) Moreover, Milam's testimony was in part corroborated by undisputed events which occurred both before and after his discharge as well as by the testimony of other witnesses, including those called by petitioner (see, *e. g.,* B. A. 64, 66, 66–67). And, finally, the individuals whom petitioner contended the Board should have believed as against Milam were plainly discredited by undisputed events and by the testimony of other witnesses. This is particularly true of Blocker, who testified that he was not aware of any union activity at the time he discharged Milam (P. A. Vol. II, 247). Yet, Milam and the others had solicited openly (*supra,* p. 4), and Foreman Bence testified without contradiction that, before the discharge, he and Blocker had discussed the employees' efforts to organize and that Blocker had characterized Milam as "working pretty hard at organizing" (B. A. 68).

Petitioner's contention that Milam was discharged for his initiation of the "no pay, no work" movement (Pet. 4), and not for his union

activity, even if true, leaves the Board's finding that he was discriminated against within the intendment of Section 8 (3) of the Act immune to challenge. As the leader of such group action, Milam would clearly, as the Board found (R. Dec. 37, n. 27), have been engaged in a form of concerted activity for the improvement of working conditions which is protected by the Act. *National Labor Relations Board* v. *Schwartz,* 146 F. 2d 773, 774 (C. C. A. 5); *National Labor Relations Board* v. *Peter Cailler Kohler Swiss Chocolates Co.,* 130 F. 2d 503, 506 (C. C. A. 2); *National Labor Relations Board* v. *Good Coal Co.,* 110 F. 2d 501, 503 (C. C. A. 6), certiorari denied, 310 U. S. 630.

2. Petitioner's attempt to raise a jurisdictional issue by questioning whether a fraudulent charge can be the basis of Board proceedings (Pet. 6, 10) is an irresolute one, no doubt because there is nothing in the record on which such a contention can be rested. The charge was filed by the Union (*supra,* p. 2), not by Milam. It asserted other unfair labor practices in addition to Milam's discriminatory discharge. All of these were sustained by the Board (R. Dec. 21–38), and, in the court below (Pet. 3), petitioner challenged only those Board findings which related to Milam's discharge (R. 81).

CONCLUSION

For the reasons stated, it is respectfully submitted that the petition for a writ of certiorari should be denied.

HAROLD JUDSON,
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OCTOBER 1945.

APPENDIX

The pertinent provision of the National Labor Relations Act (Act of July 5, 1935, c. 372, 49 Stat. 449, 29 U. S. C. 151, *et seq.*) are as follows:

> SEC. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in concerted activities, for the purpose of collective bargaining or other mutual aid or protection.
>
> SEC. 8. It shall be an unfair labor practice for an employer—
>
> (1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7.
>
> * * * * *
>
> (3) By discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization * * *
>
> * * * * *
>
> SEC. 10. * * *
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> * * * * *
>
> (e) The Board shall have power to petition any circuit court of appeals of the United States (including the Court of Appeals of the District of Columbia), or if all the circuit courts of appeals to which application may be made are in vacation, any district court of the United States (including the Supreme Court of the District of Columbia), within any circuit or

district, respectively, wherein the unfair labor practice in question occurred or wherein such person resides or transacts business, for the enforcement of such order and for appropriate temporary relief or restraining order, and shall certify and file in the court a transcript of the entire record in the proceeding, including the pleadings and testimony upon which such order was entered and the findings and order of the Board. Upon such filing, the court shall cause notice thereof to be served upon such person, and thereupon shall have jurisdiction of the proceeding and of the question determined therein, and shall have power to grant such temporary relief or restraining order as it deems just and proper, and to make and enter upon the pleadings, testimony, and proceedings set forth in such transcript a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board. No objection that has not been urged before the Board, its member, agent or agency, shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances. The findings of the Board as to the facts, if supported by evidence, shall be conclusive. * * *

(f) Any person aggrieved by a final order of the Board granting or denying in whole or in part the relief sought may obtain a review of such order in any circuit court of appeals of the United States in the circuit wherein the unfair labor practice in question was alleged to have been engaged in or wherein such person resides or transacts business, or in the Court of Appeals of the District of Columbia, by filing in

such a court a written petition praying that the order of the Board be modified or set aside. A copy of such petition shall be forthwith served upon the Board, and thereupon the aggrieved party shall file in the court a transcript of the entire record in the proceeding, certified by the Board, including the pleading and testimony upon which the order complained of was entered and the findings and order of the Board. Upon such filing, the court shall proceed in the same manner as in the case of an application by the Board under subsection (e), and shall have the same exclusive jurisdiction to grant to the Board such temporary relief or restraining order as it deems just and proper, and in like manner to make and enter a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board; and the findings of the Board as to the facts, if supported by evidence, shall in like manner be conclusive.

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